Chua Sock Chen v Lau Wai Ming & Anor

HIGH COURT (SINGAPORE) — ORIGINATING SUMMONS NO 965 OF 1989
GRIMBERG JC
4 DECEMBER 1989

Land Law — Agreement for sale and purchase of property — Completion — Title to property not issued — Whether seller of property obliged to procure fresh agreement from developer — Developer refusing unless purchaser took responsibility for seller's renovations — Notice to complete — Telex used to give notice — Whether valid — Whether seller willing and able to complete — Seller unwilling to prove that renovations authorized — Seller unwilling to prove that progress payments up to date — Conveyancing and Law of Property Act (Cap 61, 1985 Ed), s 4

This is an originating summons brought under the provisions of s 4 of the Conveyancing and Law of Property Act (Cap 61, 1985 Ed) for the purposes, in effect, of determining the rights (if any) of the plaintiff arising under an agreement between her and the defendants for the purchase of an apartment ('the property'). The defendants granted the plaintiff an option to purchase the property. The plaintiff duly exercised the option, subject to completion date. At the time the agreement between the parties came into existence, title to the property had not been issued. The defendants' solicitors declined to produce documentary evidence to establish that the works carried out to the apartment by their clients had been duly approved by the proper authorities, although it later transpired that the works had, in fact, been approved. The developers' solicitors had made it clear from the outset that the fresh agreement was conditional upon the plaintiff accepting responsibility for any consequences arising from the works carried out to the property by the defendants. This condition was not acceptable to the plaintiff. The plaintiff's solicitors were not prepared to proceed upon the basis required by the developers, and took the view that by stating they would hold the plaintiff responsible for consequences arising out of works carried out by the defendants, the developers were acting in breach of conditions 15 and/or 16 of the Housing Developers Rules 1985. The plaintiff's solicitors then lodged a caveat on the property.

The defendants issued Originating Summons No 263 of 1989 ('OS 263') by which they sought an order for the removal of the caveat. The defendants argue that the contract was repudiated by the plaintiff, and that the defendants were no longer bound to complete. The court took the view that this was a question which ought properly to be decided on an originating summons brought under s 4 of the Conveyancing and Law of Property Act (Cap 61, 1985 Ed), and not on the application for the removal of the caveat. Accordingly, the court adjourned OS 263, with liberty to restore. The plaintiff claimed, in effect, declarations that the defendants are obliged to proceed with the agreement for the sale of the property to her by procuring a fresh agreement for sale between the plaintiff and the developers, and an order that completion do take place within 21 days of the declarations sought being made. The issues which arose in determining whether the plaintiff was entitled to the relief claimed were: (i) whether by the terms of the agreement between the plaintiff and the defendants for the sale of the property, the defendants were obliged to procure a fresh agreement for sale between the plaintiff and the developers; (ii) the effect of the notice to complete contained in the letter of the defendants' solicitors dated 14 December 1988, in the event that happened; and (iii) the present position of the parties.

Held, dismissing the plaintiff's applications and holding them in default:

(1) The plaintiff and the developers were never ad idem with regard to the terms and conditions of the proposed fresh agreement, the procurement of which was suggested by the defendants' solicitors. However, the developers' terms were not accepted by the plaintiff. Therefore, the agreement between the plaintiff and the defendants was constituted by the option dated 27 August 1988 which the plaintiff accepted on 10 September 1988. The procurement of a fresh agreement was not part of the agreement.

(2) Neither condition 29(2) nor (3) of the Law Society of Singapore's Conditions of Sale 1981 call for the giving or serving of notice to complete by a stipulated method. In these days of instantaneous communication, it would be unrealistic and retrogressive, in the absence of clear words to the contrary in the conditions, to hold that the giving or service of a notice to complete under condition 29(2) and (3) by fax or telex is bad. The court therefore found that the defendants' notice to complete was validly served by fax on 14 December 1988 and that the period of notice began to run from 15 December. It was incumbent upon the recipient of such a notice, by virtue of condition 29(3), to stipulate a date within the notice period on which completion of the transaction is to take place.

(3) The plaintiff's solicitors also contended that the defendants' notice to complete was bad in law as the defendants were not, as required by condition 29(3), 'ready, willing and able to complete' because (i) the defendants had failed to provide the plaintiff with a letter from the Building Control Division, stating that the works carried out to the property by the defendants had been approved, which they were obliged to furnish by virtue of the agreement between the parties; (ii) the defendants did not produce a letter from the developers to the effect that no progress payments which had fallen due remained unpaid; and (iii) the defendants did not produce a letter from the developer certifying that there was no interest due for late progress payments. The court found no substance in the allegation that the defendants' notice to complete was ineffective on the grounds that the defendants were not ready, able and willing to com-plete. The defendants' notice to complete was effective, and the plaintiff had failed to comply with it by not stipulating a date for completion falling within the notice period.

(4) The defendants are not obliged to complete the transaction, and they are entitled, by virtue of condition 29(4)(b) of the Singapore Law Society's Conditions of Sale 1981, to forfeit the deposit paid by the plaintiff. Costs of these proceedings be taxed and paid by the plaintiff.

[*Editorial Note*: The plaintiff has appealed to the Court of Appeal vide Civil Appeal No 2 of 1990 (in respect of OS No 965 of 1989) and Civil Appeal No 3 of 1990 (in respect of OS No 263 of 1989).]

Legislation referred to
Conveyancing and Law of Property Act (Cap 61, 1985 Ed) s 4

R Pala Krishnan (*CH Eng* and *Percy Mendis* with him) for the plaintiff.
Tongel Yeo (*Thomas Toh* with him) for the defendants.

Cur Adv Vult

Grimberg JC: This is an originating summons brought under the provisions of s 4 of the Conveyancing and Law of Property Act (Cap 61, 1985 Ed) for the purposes, in effect, of determining the rights (if any) of the plaintiff

arising under an agreement between her and the defendants for the purchase of an apartment known as No 3, Ontario Avenue #01-02, Singapore ('the property').

The defendants granted the plaintiff an option to purchase the property. The option was dated 27 August 1988, and it was expressed to expire on 10 September 1988. The plaintiff duly exercised the option, subject to completion date being extended to 12 weeks from the date of its exercise, and subject to the sale price of $458,000, including the price of furniture and fixtures. These variations were agreed to by the defendants' solicitors on their behalf. Completion was required to take place on or before 4 December.

At the time the agreement between the parties came into existence, title to the property had not been issued. By a letter dated 19 September 1988, the defendants' solicitors drew this fact to the attention of the plaintiff's solicitors, and stated:

> Perhaps your clients may wish to take a fresh sale and purchase agreement from the developers, at your client's cost/expense, of course, and between our respective clients, a deed of assignment shall be executed. We will forward you with whatever documents evidencing title presently in our clients' custody shortly.

The plaintiff's solicitors responded on 19 September 1988, saying that their client 'would like to have a fresh sale and purchase agreement', and asking to be informed of the developers' terms and conditions.

The developers' solicitors were approached by the defendants' solicitors concerning the question of a fresh agreement for sale between the developers and the plaintiff, and by a letter dated 30 September 1988 the developers' solicitors wrote in the following terms to the defendants' solicitors:

> We have been instructed by our clients that your clients have done extensive renovation to the unit. As such, before our clients consider giving their consent (ie to a fresh agreement), our clients would like a written confirmation from the sub-purchaser that she is purchasing the property on an 'as is where is' basis and that our clients will not be responsible for all those renovation works carried out by your clients.

The defendants' solicitors, in turn, wrote to the plaintiff's solicitors on the same day, enclosing a copy of the letter they had received from the developers' solicitors, and stating:

> Kindly let us have your client's written confirmation that she is purchasing the above property on a 'as is where is' basis and that she shall not hold the developers responsible on the renovation works carried out by our clients.

The plaintiff's solicitors telexed the defendants on 1 October 1988 in the following terms:

> To enable our client to come to a decision, please let us have evidence that the renovation works concerned have been approved by the relevant authority.

To put it shortly, the defendants' solicitors declined to produce documentary evidence to establish that the works carried out to the apartment by their clients had been duly approved by the proper authorities, although it later transpired that the works had, in fact, been approved.

By letter dated 2 December 1988, the developers' solicitors informed the defendants' solicitors that the developers had executed a fresh sale and purchase agreement with the plaintiff, but stating:

> ... that our clients are completing this sub-sale on the understanding that your client's purchaser is fully aware of the extensive renovation carried out by your client in which no planning approval has been submitted. Our clients are now in the process of applying for the certificate of fitness and in the event of any delay in the issuance of the certificate of fitness or subsidiary strata title, our clients will hold the sub-purchaser responsible.

The plaintiff's solicitors were not prepared to proceed upon the basis required by the developers, and took the view that by stating they would hold the plaintiff responsible for consequences arising out of works carried out by the defendants, the developers were acting in breach of conditions 15 and/or 16 of the Housing Developers Rules 1985.

Completion date, 4 December 1988, came and went with the plaintiff and the developers standing firm, the defendants' solicitors at this stage in unequivocal support of the position adopted by the plaintiff's solicitors. Indeed, on 6 December 1988, the defendants wrote to the developers' solicitors, saying:

> Completion is now being delayed because of your conduct now in insisting on the introduction of the subject condition and our clients reserve their rights to claim damages/indemnity against your clients for the delay, which continues to date.

The developers' solicitors were unmoved. Accordingly, by a letter dated 14 December 1988, the defendants' solicitors told the plaintiff's solicitors that if they wanted a fresh agreement it was for them 'to push' the developers' solicitors. The defendants' solicitors went on:

> Once again, we wish to advise that we are ready to complete and on completion we will let you have:
>
> (a) duly executed deed of assignment (in duplicate) in favour of your client;
> (b) duly executed application to notify discharge of charge together with the lodgment fee;
> (c) withdrawals of caveat CV/54664A and CV/55189A together with the lodgment fees;
> (d) a copy of letter from the developers' solicitors confirming there is no outstanding interest for late payment;
> (e) two copies of notice of transfer; and
> (f) the keys to the premises.
>
> In exchange, kindly let us have the following:
>
> (a) cashier's order for $67,691.28 in favour of CPF Board;
> (b) cashier's order for $183,264.98 in favour of United Overseas Finance Ltd; and
> (c) cashier's order for $137,072.13 in favour of our clients.

The defendants' solicitors proceeded, in the same letter, to give the plaintiff 21 days' notice to complete pursuant to condition 29 of the Singapore Law Society's Conditions of Sale 1981, to which conditions the agreement between the plaintiff and the defendants was subject.

The letter of the defendants' solicitors of 14 December 1988 was faxed to the plaintiff's solicitors, and will therefore have been received simultaneously with its transmission, on the same day. The original typed letter was sent by registered post, and was received by the plaintiff's solicitors the following day, 15 December 1988.

In a telexed response to the defendants' solicitors dated 15 December 1988, the plaintiff's solicitors asserted that the defendants were not ready to complete because certain documents which had been requested had yet to be provided. However, what was clearly uppermost in the minds of the plaintiff's solicitors was the refusal of the developers to agree unconditionally to a fresh agreement for sale. They said:

> Most importantly, your clients have not resolved the issue relating to the fresh agreement with the developers which is an obligation of your clients as conceded by you, both parties having acted on it on that basis since 17 November 1988. Your 21-day notice to complete is therefore invalid and bad in law.

Thereafter, the plaintiff's solicitors continued to maintain that the defendants' notice to complete was 'bad in law'. In a letter dated 15 December 1988, the defendants' solicitors informed the plaintiff's solicitors for the first time that the works carried out to the property by their clients had been approved by the Building Control Division. They provided no evidence to support this statement, and declined to provide the developers with a copy of the plans. I am satisfied that unless plans are provided, a normal search cannot be relied on to establish whether or not alterations to a property have been approved.

By a circular dated 21 December 1988, addressed presumably to clients and other firms of solicitors with whom they had dealings including the plaintiff's solicitors, the defendants' solicitors announced that their office would be closed, inter alia, from 29 December 1988 to 4 January 1989. By telex dated 6 January 1989 to the plaintiff's solicitors, the defendants' solicitors stated:

> For the record, our clients' notice given to your client to complete will expire on 7 January 1989 and our clients reserve all their rights in the matter.

The plaintiff's solicitors replied on the same day:

> You have been placed on notice that your notice is bad in law, and that you are not to release the said sum (the 10% deposit) paid by our client to you to your clients. Should you decide to release the said sum on 7 January 1989 or thereafter, you do so at your own risk.

Meanwhile, the plaintiff's solicitors had, on 21 December 1988, lodged a caveat no CV/75459A ('the caveat') against the property. By telex dated 14 February 1989 the defendants' solicitors demanded that the caveat be withdrawn. The riposte of the plaintiffs' solicitors, by telex dated 18 February 1989, was to reassert that the defendants had never been ready to complete, not having procured an unconditional fresh agreement with the developers and having failed to furnish the plaintiff's solicitors with certain documentation. The plaintiff's solicitors, by the same notice, gave the defendants 21 days' notice to complete.

On 21 March 1988, the defendants issued Originating Summons No 263 of 1989 ('OS 263') by which they sought an order for the removal of the caveat. OS 263 came on before me on 25 August 1989. It was evident from affidavits sworn by the plaintiff (the defendant in OS 263) that she had complained to the Controller of Housing concerning the developers' insistence that they would only enter into a fresh agreement on condition that the plaintiff accepted responsibility for the works carried out to the property by the defendants. As a consequence of the plaintiff's complaint, the Controller of Housing had met the developers, and by a letter to the plaintiff dated 14 August 1989, he informed her that the developers had 'agreed to complete this matter in accordance with r 16 of the Housing Developers Rules 1985'.

The plaintiff's solicitors had continued to wrangle with the developers' solicitors, but it was obvious that by 21 August 1989, with the assistance of the Controller of Housing, the plaintiff's solicitors and the developers' solicitors had come close to agreeing upon a basis for proceeding on the footing of a fresh agreement between their respective clients.

Accordingly, after hearing substantial argument, it being evident to me that an accommodation between the plaintiff and the developers was within reach, I adjourned OS 263 and directed the defendants' solicitors to procure a meeting between themselves, the developers' solicitors and the office of the Controller of Housing in the hope that completion might take place before the date of the adjourned hearing. Before counsel for the parties withdrew, counsel for the plaintiff and the defendants agreed, in the light of my direction, that completion would take place without prejudice to the question of liability for interest.

At the resumed hearing of OS 263 on 2 September, the defendants were represented by fresh solicitors and another counsel. He informed me that his instructions were to argue that the contract was repudiated by the plaintiff, and that the defendants were no longer bound to complete. I took the view that this was a question which ought properly to be decided on an originating summons brought under s 4 of the Conveyancing and Law of Property Act (Cap 61, 1985 Ed), and not on the application for the removal of the caveat. Accordingly, I adjourned OS No 263, with liberty to restore.

Hence the originating summons in respect of which this judgment is delivered. In the present proceedings, the

plaintiff claims, in effect, declarations that the defendants are obliged to proceed with the agreement for the sale of the property to her by procuring a fresh agreement for sale between the plaintiff and the developers, and an order that completion do take place within 21 days of the declarations sought being made.

The issues which arise in determining whether the plaintiff is entitled to the relief claimed are:

(i) whether by the terms of the agreement between the plaintiff and the defendants for the sale of the property, the defendants were obliged to procure a fresh agreement for sale between the plaintiff and the developers;
(ii) the effect of the notice to complete contained in the letter of the defendants' solicitors dated 14 December 1988, in the event that happened; and
(iii) the present position of the parties.

The terms of the agreement

In my judgment, the defendants were under no obligation to procure a fresh agreement for sale between the plaintiff and the developers. The option, as varied, made no provision for such fresh agreement. It is true that subsequent to its acceptance, the defendants' solicitors suggested the conclusion of a fresh agreement between the plaintiff and the developers, and that a fresh agreement was, in fact, executed by the plaintiff. However, the developers' solicitors had made it clear from the outset that the fresh agreement was conditional upon the plaintiff accepting responsibility for any consequences arising from the works carried out to the property by the defendants. This condition was not acceptable to the plaintiff and remained unacceptable to her, as we have seen, throughout the history of the transaction. Whether, in insisting on that condition, the developers were in breach of any of the provisions of the Housing Developers Rules 1985 is not relevant for the purposes of deciding the first issue. The fact is that the parties were never ad idem with regard to the terms and conditions of the proposed fresh agreement between the plaintiff and the developers, the procurement of which had been suggested by the defendants' solicitors. It is clear from the telex of the plaintiff's solicitors of 19 September 1988, to which I have already referred, that the fresh agreement route depended upon the plaintiff's acceptance of the developers' terms. It is equally clear that their terms were never accepted.

In the result, the agreement between the plaintiff and the defendants was constituted by the option dated 27 August 1988 which the plaintiff accepted on 10 September 1988, the terms of the option having subsequently been varied in the respects earlier referred to by an exchange of telexes between the contracting parties' solicitors. The procurement of a fresh agreement between the plaintiff and the developers formed no part of the defendants' obligations under their agreement with the plaintiff.

The effect of the defendants' solicitors' notice to complete

Conditions 29(2) and (3) of the Singapore Law Society's Conditions of Sale 1981 provides as follows:

> (2) If the sale shall not be completed on the date fixed for completion either party may on that date or at any time thereafter (unless the contract shall first have been rescinded or become void) give to the other party notice in writing to complete the transaction in accordance with this condition but such notice shall only be effective if the party giving the same at the time the notice is sent is either ready, able and willing to complete or is not so ready, able and willing by reason of the default or omission of the other party to the contract.
>
> (3) Upon service of an effective notice pursuant to the preceding clause it shall be an express term of the contract that the party to whom the notice is given shall complete the transaction within 21 days after the day of service of the notice (excluding the day of service) and in respect of such period time shall be of the essence of the contract but without prejudice to any intermediate right of rescission by either party.

As we have seen, the defendants' solicitors faxed their notice to complete to the plaintiff's solicitors on 14 December 1988 and followed up by posting the original notice, which the plaintiff's solicitors received on 15 December 1988. Counsel for the plaintiff argued that the 21-day notice period began to run from 16 December, the day after the original notice was received by post. He contended that the faxed transmission of the notice to complete on 14 December was not good service of the notice for the purposes of condition 29(2) and (3).

I am unable to accept that contention. Neither of the two conditions I have quoted calls for the giving or serving of notice to complete by a stipulated method. In these days of instantaneous communication it would be unrealistic and retrogressive, in the absence of clear words to the contrary in the conditions, to hold that the giving or service of a notice to complete under condition 29(2) and (3) by fax or telex is bad. I therefore find that the defendants' notice to complete was validly served by fax on 14 December 1988; that the period of notice began to run from 15 December, and that the last day of the notice period was 4 January 1989.

I hold the position to be that, provided a notice to complete is effective, it is incumbent upon the recipient of such a notice, by virtue of condition 29(3), to stipulate a date within the notice period on which completion of the transaction is to take place. Had the plaintiff in this case chosen to stipulate 4 January 1989 as completion date, that might have added a new dimension to the parties' problems because the defendants' solicitors had chosen to close their offices on that day, the last day of the notice period.

However, the plaintiff's solicitors did not stipulate 4 January 1989 as the completion date. Indeed, they did not stipulate any date within the notice period as the completion date because they took the view that the defendants' notice to complete was ineffective or, as their solicitors chose to put it, 'bad in law', on the grounds that at the time the notice was given the defendants were not, as required by condition 29(3), 'ready, willing and able to complete'.

Counsel for the plaintiff argued that this was so for two reasons — first, because the defendants had failed to procure a fresh agreement between the plaintiff and the developers; and secondly, because the defendants had failed to provide the plaintiff with certain documentation which they were obliged to furnish by virtue of the agreement between the parties.

I have already indicated that, in my judgment, it was not incumbent upon the defendants to procure a fresh agreement between the plaintiff and the developers, and the plaintiff accordingly fails in her contention that the defendants were not ready, able and willing to complete on this first ground.

As to the second ground, namely, the alleged failure to furnish documentation, it was contended on behalf of the plaintiff that the defendants were not ready, able and willing to complete at the time their notice was dispatched on 14 December 1988 because, as of that date, they had failed:

(i) To produce a letter from the Building Control Division to the effect that the works carried out to the property by the defendants had been approved. I find, in regard to this contention, that such a letter was not called for by the terms of the agreement between the parties.

(ii) To produce a letter from the developers to the effect that no progress payments which had fallen due remained unpaid. Insofar as this allegation is concerned, I find that the plaintiff was aware of, and accepted, that only 10% of the purchase price remained payable to the developers, and that this final payment would become due upon issue of title. As at the date of giving notice to complete, the plaintiff was in possession of a copy of a letter from the developers to their solicitors dated 2 December 1988 stating that the defendants had paid 90% of the purchase price. Accordingly, it followed that no progress payments were due.

(iii) To produce a letter from the developers to the effect that no interest was due for late progress payments. In my judgment, and I so find, the clear inference to be drawn from the letter referred to in the preceding paragraph was that no interest was due for late progress payments. In any event, the defendants' solicitors undertook to produce a letter from the developers' solicitors, so confirming, on completion.

(iv) To produce a letter from the developers confirming that no maintenance fees were due, and that no interest was payable on overdue maintenance fees. As to this assertion, I find that under cover of a letter dated 30 November 1988 the defendants' solicitors sent the plaintiff's solicitors a copy of the developers' receipt evidencing payment of maintenance charges for the period 7 November 1988 to 6 January 1989. At no time between the date this receipt was furnished and the date of expiry of the defendants' completion notice did the plaintiff's solicitors complain that the receipt so furnished fell short of satisfying them that maintenance payments were up to date, and that no interest was owed in respect of maintenance charges.

In the result, I find that there is no substance in the allegation that the defendants' notice to complete was ineffective on the grounds that, when giving it, the defendants were not ready, able and willing to complete for any of the reasons advanced on behalf of the plaintiff. I hold that the defendants' notice to complete was effective, and that the plaintiff failed to comply with it by stipulating a date for completion falling within the notice period.

Counsel for the plaintiff raised a subsidiary argument in support of his contention that the notice to complete was 'bad in law'. He pointed to the fact that, by a telex dated 6 January 1989, the defendants' solicitors stated:

> For the record our clients' notice given to your client will expire on 7 January 1989 and our clients reserve all their rights in the matter.

Since, it was argued, the notice to complete faxed by the defendants' solicitors expired on 4 January 1989, the telex dated 6 January 1989 amounted to an extension of the 14 December notice, and was bad by virtue of condition 29(6), since the defendants' solicitors purported to extend their original notice without the consent of the plaintiff. Alternatively, the telex of 6 January 1989 amounted to a fresh notice, replacing the 14 December notice, and was thus bad for insufficiency since condition 29(3) calls for notice of 21 days' duration.

Those arguments are untenable. It is plain on the face of the telex of the defendants' solicitors dated 6 January 1989 that they were not purporting to extend the notice to complete given on 14 December 1988 or to give fresh notice, but that the defendants' solicitors had simply miscalculated the date upon which the original notice, which had already expired and with which the plaintiff's solicitors had wrongly declined to comply, came to an end.

The only other argument advanced with any conviction by counsel for the plaintiff in support of the orders sought by his client, was that when I gave directions on 25 August 1989, in OS 263, it was agreed by both counsel for the parties in my presence that completion would take

place 'without prejudice to the question of liability for interest' for late completion. That agreement, it was asserted, bound the defendants, and they were obliged to complete on the basis of it.

I do not agree. The course taken by counsel for the defendants was pressed upon him by me in the hope that an accommodation might be reached between the parties concerning completion, notwithstanding my virtual conclusion that the caveat should be discharged. What followed those directions cannot be said to have amounted to a freely negotiated agreement. When the parties appeared before me again a week later, new counsel for the defendants made it plain that his instructions were to argue that the defendants were under no obligation to complete the sale.

The present position of the parties

In my judgment, for the reasons stated, the defendants are not obliged to complete the transaction, and they are entitled, by virtue of condition 29(4)(b)(i) of the Law Society Conditions, to forfeit the deposit paid by the plaintiff. Accordingly, I make no orders on this originating summons save an order that the costs of these proceedings be taxed and paid by the plaintiff.

Application dismissed.

Solicitors: *Pala Krishnan & Partners; Chong Yeo & Partners.*

Reported by *Terence Tan Bian Chye*

Peters Edition Ltd v Renner Piano Co

Associated Board of the Royal Schools of Music v Renner Piano Co

HIGH COURT (SINGAPORE) — SUIT NOS 103 OF 1989 AND 104 OF 1989
YONG PUNG HOW J
24 NOVEMBER 1989

Civil Procedure — Anton Piller order — Genuine and pirated goods mixed — Plaintiff seizing both — Whether plaintiff under a duty to return genuine goods — Whether plaintiff had good reason for not returning goods — Limits of Anton Piller order to be meticulously obeyed

The defendants in these two actions are local retailers of musical instruments and publications. The plaintiffs are both music publishers in the United Kingdom. The defendants have been long standing customers of both plaintiffs and have been making frequent purchases from them. In both suits, the respective plaintiffs alleged against the defendants the infringement of copyright and passing off in various books ('the works'). Each suit therefore claimed a declaration of infringement of copyright; an injunction to restrain the defendants; an order for delivery up for destruction; an inquiry as to damages or an account of profits; and costs.

The defendants admitted that they had infringed the copyright of the plaintiffs and consented to judgment being entered against them, with an inquiry to be held to quantify damages. The dispute in the present appeals, however, is in the use by each of the plaintiffs of the Anton Piller order procedure, and the subsequent developments which have flowed from it. On the instructions of the plaintiffs' solicitors, a private investigator from a security firm made trap purchases of a copy each of four of the works. The copies were sent back to the United Kingdom for tests to be done on them. When the writ was filed, the plaintiffs made an ex parte application by way of summons-in-chambers for an Anton Piller order. Upon the plaintiffs' undertaking by their counsel to keep in safe custody any articles which might be taken and to pay damages, if later found liable, the defendants were required, inter alia, to permit entry and search of their premises, and the identification and removal of any unauthorized reproductions of the works which might be found. A considerable quantity of material was then seized and removed, to be kept in safe custody by the plaintiffs' solicitors. The defendants were unhappy as they believed that genuine copies of the works, which they had bought from the plaintiffs and for which they had paid, had also been taken away. Following a joint inspection of the seized items by both parties, the defendants took out a summons-in-chambers for an order that the plaintiffs release and return unconditionally to them those musical publications in the container which were set out in the schedule to the summons, which they claimed to be copies of the works for which they had paid.

Held, allowing the defendants' application:

(1) The Anton Piller order allowed the plaintiffs to remove only unauthorized reproductions of the works. In this case, the defendants had been purchasing genuine copies of the works from the plaintiffs for some 20 years, and the stocks in their premises included both such genuine copies of the works and unauthorized reproductions. Some bundles of allegedly unauthorized reproductions were even taken away without their being unpacked for examination. In the result, it was an inescapable inference that at least some copies of the works were also removed. This much was in fact admitted by the chairman and managing director of the plaintiffs. In the court's opinion, the sweeping powers accorded to plaintiffs by Anton Piller orders, which are so freely granted by the courts, impose on plaintiffs a serious responsibility to see that the terms of the orders are strictly adhered to and that there is no breach of any of the terms. The plaintiffs must ensure that only unauthorized reproductions are removed and no more. This may well impose a heavy burden on plaintiffs in some cases, as in this case, where authentic publications in the premises are mixed with unauthorized reproductions, and identification and separation may no longer be a simple matter.

(2) The plaintiffs' only argument against the release and return of any of the seized materials was that they constituted the evidence which the plaintiffs needed to prove their case. This was not an argument which found any favour with the court since the defendants in this case had already admitted liability and consented to judgment being entered against them.

(3) If what the plaintiffs really meant was that the retention of all the seized materials would be necessary to enable them to quantify damages, this appeared to the court to be a totally unrealistic approach towards this particular problem. The prayers in their own statement of claim had asked for damages, or alternatively an account of profits and the court could not see, in the absence of any explanation, how unsold materials could help them.